No. 521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

PUBLIC SERVICE CORPORATION OF NEW JERSEY,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Of Counsel.

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CITATIONS

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SECURITIES AND EXCHANGE COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioner, Public Service Corporation of New Jersey, prays that a writ of certiorari be issued to review a decree of the United States Circuit Court of Appeals for the Third Circuit affirming an order of the Securities and Exchange Commission.

OPINION BELOW

The findings and opinion of the Securities and Exchange Commission (R. 23-49) are not yet officially reported. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 2057-2066) is reported in 129 F. 2d 899.

JURISDICTION

The opinion of the circuit court of appeals was filed and its order of affirmance was entered on August 12, 1942 (R. 2057, 2066). The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935, August 26, 1935, c. 687, Sec. 24(a), 49 Stat. 803,

834-835 (15 U. S. C. Sec. 79x(a)) and Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Securities and Exchange Commission has in effect held that petitioner, Public Service Corporation of New Jersey (hereinafter called Public Service), is a subsidiary, within the meaning of the Public Utility Holding Company Act, of an entity composed of two holding companies designated by the Commission as "UGI-United". Thereby, Public Service, which is now subject to various provisions of the Act, is made subject also to the "death sentence" provisions of Section 11(b). United Gas Improvement Company, or "UGI", holds 28.4% of the voting securities of Public Service. The United Corporation, or "United", holds 13.9%. In brief, the statute provides that a company shall be held to be a subsidiary if it is "controlled" or "subject to a controlling influence" of a specified character by another. The questions presented are:

(1) Whether the Commission may lawfully, and without evidence, take the sum of the stockholdings of diverse interests and lump them into an artificial entity it designates as "UGI-United" in order to make it appear that a controlling block of voting securities is held by a single interest;

(2) Whether the Commission has discharged its duty under the statute in declining both (a) to hold affirmatively that Public Service is or is not within the statute or (b) to find the basic facts to support its action, the effect of which is that Public Service is determined to be a subsidiary of "UGI-United" and subject to the "death sentence" provisions of the Act;

(3) Whether the mere technical possibility of *future acquisition of* control by "UGI-United" brings Public Serv-

ice within the statute—particularly where (1) the present voting power of "UGI-United" is illusory and problematical in the ordinary corporate affairs of Public Service, (2) the instances are negligible where a two-thirds vote is required in which "UGI-United" might withhold consent, (3) under unrelated provisions of the statute "UGI-United" is in any event requierd to divest itself of its Public Service holdings, to which end separate admistrative proceedings are now nearing conclusion and will preclude all possibility of future control or controlling influence by UGI or United or both, (4) meanwhile such stockholdings of "UGI-United" are sterilized by the Public Utility Holding Company Act itself, and (5) the Act provides several safeguards against the possibility of future control.

(4) Whether the past contacts between Public Service and UGI or United, which are indicative of no control or controlling influence and in which the Commission has not expressly found control by either or both of the latter, are sufficient to bring Public Service within the statute—when such intercorporate contacts involve nothing more than (a) a small minority of common directors with UGI and United which no longer exists, (b) a single joint venture with UGI into the construction business which has been dissolved, or (c) the previous participation of UGI as a stockholder in some matters involving all the stockholders.

STATUTE INVOLVED

This proceeding is brought pursuant to Section 2(a) (8) of the Public Utility Holding Company Act (August 26, 1935, 49 Stat. 803, 15 U. S. C. sec. 79) which, in pertinent part, reads as follows:

> Sec. 2.(a) * * *
>
> (8) "Subsidiary company" of a specified holding company means—

(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause * * * unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company;

* * * * * * *

The Commission, upon application, shall by order declare that a company is not a subsidiary company of a specified holding company under clause (A) if the Commission finds that (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company of such specified holding company until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of, and as a part of, any order granting such application, the Commission may re-

quire the applicant to apply periodically for a renewal of such order and to file such periodic or special reports regarding the affiliations or intercorporate relationships of the applicant as the Commission may find necessary or appropriate to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke the order declaring such company not to be a subsidiary company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order. Any application under this paragraph may be made by the holding company or the company in respect of which the order is to be entered, but as used in this paragraph the term "applicant" means only the company in respect of which the order is to be entered.

Official "slip law" prints of the complete Act, obtained from the Government Printing Office, are filed herewith.

STATEMENT.

Pursuant to Section 2(a)(8) of the Holding Company Act, Public Service Corporation of New Jersey (herein called Public Service) on November 28, 1935, filed with the Securities and Exchange Commission (herein called the Commission) its application for a determination that it is not a subsidiary of either the United Gas Improvement Company (herein called UGI) of Pennsylvania or The United Corporation (herein called United) of Delaware

(R. 109-127).[1] Hearings were not held by the Commission until April and May of 1941, and the Commission denied the application by its order of September 15, 1941 (R. 22-23). Posing the question as "whether the applicant has demonstrated" freedom from outside control (R. 27-28), the Commission justified its order on the ground that petitioner had "not sustained the burden of proving that it is not controlled by UGI and United, or subject to their controlling influence" (R. 46). Petition for rehearing (R. 51-64) was denied (R. 65-67). On petition for review (R. 1-21) the Circuit Court of Appeals for the Third Circuit (R. 1-21), by its opinion and order of August 12, 1942, affirmed the Commission (R. 2057-2066).

The underlying issue is whether or not Public Service—which is in any case subject to certain other provisions of the statute—shall also be made subject to the "death sentence" provisions of Section 11(b). The undisputed basic facts cover a period of forty years and involve the operations of a state-wide utility system. They are summarized, with complete references to the largely documentary record, in the Appendix separately printed and filed herewith. Throughout this petition references are made to that Appendix detailing the origins, nature, organization, personnel, corporate history, and intercorporate relations of Public Service.

Except to the extent that popular demand makes it necessary to operate certain of its transportation lines over or under the Hudson or across the Pennsylvania line, Public Service is an intrastate utility system operating gas, electric, and transportation enterprises over the greater part

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[1] It also filed an application, pursuant to Section 3(a) of the Act, for the exemption of itself and subsidiaries as an intrastate system (R. 1098-1115). No proceedings were held under this application but instead the Commission issued its Rule U-2 exempting all such systems from the statute. 6 F. R. 2016.

of New Jersey (Appendix, pp. 3-4). It was organized in 1903 by the acquisition of the stock of one electric company and four street railway companies, and the leasing of gas and other electric properties (Appendix, pp. 2-3). Its internal organization is set forth in the Appendix (pp. 4-7).

UGI, as the holder of investments in various gas and electric enterprises throughout the country, held shares in some of these underlying companies and, in the original exchange as well as in subsequent mergers and stock issues, secured its present holdings of Public Service voting securities (see page 42, *infra;* and Appendix, pp. 14-18). In the early 1920's two partners in Bonbright and Company acquired a block of Public Service shares which found their way into United upon the organization of the latter in 1929 (see Point II(B) of the argument *infra*). Except that United also owns more than 10% of the stock of UGI (R. 1117-1118), the present record contains no evidence respecting the relation of United to UGI or of any agreement, understanding, or device between them with direct or indirect reference to or effect upon Public Service.

Without exception, the officers of Public Service Corporation and its subsidiaries are all long-time bona fide residents of New Jersey (R. 241, 245, 246, 441, 442, 759, 1215) and none has been selected or recommended by any other utility interest (R. 627, 723, 758, 827, 857, 869, 847-848, 1211, 1214, 1216, 1218) or has any interest in any other electric, gas, or transportation utility whatever (R. 827-828, 846, 1215, 1217, 1219). With three exceptions,[2] none of the gen-

[2] General Rose, formerly a New Jersey banker, became a director in 1931 and vice president in charge of the southern division in 1932 (R. 237, 534, 1214). The other two are Vice Presidents Thomas N. McCarter, Jr., and Robert A. Zachary, the latter having previously been a newspaper man and secretary to New Jersey's United States Senator (later ambassador) Walter E. Edge (R. 245).

eral officers of Public Service has been with Public Service less than 20 years, and many of them have been with the system since its beginning. Most of them are also directors in the Corporation or its subsidiaries, or both. They have held various positions, some of them progressing from very minor posts. The top officers, however, have been the same for a great many years and their actual responsibilities have been the same regardless of their titles (R. 173-174). Directors are appointed solely upon the recommendation of the higher officers of Public Service (R. 723-725, 928).

Neither United or UGI furnishes service to, conducts or controls operations for, or has common officers or directors with, Public Service or any of its subsidiaries (R. 927-928). No officer or director has ever reported to, or received orders from, any officer or employee of United or UGI, or has observed any control or influence by United or UGI—as shown by the testimony relating to the following officers, offices, and departments of Public Service:

chairman of the boards (R. 269-271, 279, 298-299);
directors (R. 848, 1212, 1214-1215, 1216-1217, 1218-1219);
president (R. 699, 703-705, 710-711, 725-726, 728-731);
chairman of executive committees and former vice president in charge of finance (R. 507, 512, 515-517);
operating committee (R. 474-475, 478-479);
vice president in charge of gas operations (R. 504-806, 815);
vice president in charge of electric operations (R. 759-760, 761-762);
purchasing, real estate, and tax department (R. 681, 862-866, 874, 876-878);
public relations department (R. 835-836, 837-840);
commercial department (R. 482-483);

general attorney (R. 824-827, 828, 832);
general solicitor (R. 628, 630-631, 634, 637);
treasurer (R. 204-205);
secretary (R. 187); and
any and all of them (R. 723-726, 927, 928).

McCarter—the originator, organizer, and chief executive officer of Public Service throughout its history—testified that relations "with all these corporations" had been friendly, by and large, but without control (R. 269, 271, 294-302, 328, 441). If UGI alone or in combination with United should attempt control, "it would create nothing more or less than an uprising in New Jersey. The people of New Jersey would not stand for it. * * * I would give them the greatest battle they ever had * * * I don't think [they] would succeed" (R. 295-296, 300-302). Zimmermann, the president of UGI, testified that the latter had never attempted to control Public Service (R. 938), did not consider that it had control (R. 946-947), and doubted the outcome of any fight for control (R. 989-995), saying: "Anybody who knows Mr. McCarter would know that it would be silly to think that anybody could control Mr. McCarter. It just cannot be done" (R. 938). And he testified that, in the event of a proxy fight, McCarter might bring out the shares to the extent of "90 per cent if he went after it" (R. 992). Both United and UGI denied control or controlling influence over Public Service, and declined to participate in the proceeding (R. 133, 1120-1122).

UGI holds 28.4% and United 13.9% of the total voting securities of Public Service (R. 1391). Including institutions, there are some 86,000 individual shareholders, of which some 43,000 or 50.56% are resident in New Jersey, 17,000 or 20.70% in New York State, and a scattering of from 2% to 7% in Pennsylvania, Massachusetts, and Connecticut (R. 162-163, 754-755, 1032). The percentage of voting

securities, irrespective of individual ownership, held in New Jersey comprises 31% of the total, in Pennsylvania 33%, and in New York 22% (R. 1032-1033). Neither the UGI or United holdings in Public Service have ever been voted except upon form proxies solicited by and given to the management of Public Service in the usual course and without strings or instructions (R. 177, 189-191, 280-282, 1044-1045, 1066-1067).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

(1) In affirming and sustaining the findings and order of the Commission to the effect that "UGI-United" or "UGI and United" control, or exercise controlling influence over, Public Service within the meaning of the Public Utility Holding Company Act;

(2) In holding that the Commission relied upon evidence as to the actual relation between United and UGI and impliedly holding that there was substantial evidence to sustain a finding that United controls or exercises controlling influence over UGI;

(3) In failing to hold that the Act creates no presumption of control or controlling influence from the mere fact of ownership by United of 10% or more of UGI voting securities;

(4) In failing to hold that the Commission relied upon a conclusive presumption of control or controlling influence by United over UGI;

(5) In failing to hold that the Act is invalid if, predicated upon nothing more than ownership of 10% or more voting securities, it creates a presumption of either evidentiary or conclusive effect as to control or controlling influence by one corporation over another;

(6) In holding that the Commission is not required to make affirmative findings or conclusions as to whether or not Public Service is or is not controlled by, or subject to the controlling influence of, a holding company;

(7) In holding that the Commission is not required to make affirmative subsidiary findings of fact as to the means, methods, or devices by which "UGI-United" controls Public Service or subjects it to controlling influence;

(8) In failing to hold that the Commission unlawfully cast upon petitioner the burden of demonstrating to the arbitrary satisfaction of the Commission—three members participating—the fact of its independence from control or controlling influence of a holding company;

(9) In holding that the mere possibility of future control or controlling influence is sufficient to render Public Service a present subsidiary of a holding company;

(10) In failing to hold that the Commission has ignored both the statute and the undisputed facts in finding a possibility of future control or controlling influence by "UGI-United" over Public Service;

(11) In failing to hold that the operation of the Act itself precludes, under the undisputed facts here presented, any control or controlling influence by "UGI-United" or either of them over Public Service;

(12) In failing to hold that the Commission, in its findings of "historical relationship" between Public Service and "UGI-United", has ignored the sole evidence and rested decision upon alleged basic facts contrary to the evidence; and

(13) In failing to hold that the Commission has rested its decision upon findings contrary to the sole and undisputed evidence, has acted arbitrarily and capriciously in

refusing to consider all of the evidence, has assumed itself authorized to go beyond the scope and purpose of the Act in determining "public interest", and has undertaken to deny petitioner's application without the findings of basic fact required by the statute and the constitutional requirements of due process of law.

REASONS FOR GRANTING THE WRIT.

The underlying issue in this case is whether Public Service Corporation of New Jersey shall be subject to the "death sentence" provisions of Section 11 of the Public Utility Holding Company Act. It thus presents one of those "concrete situations" which this Court declined to anticipate in its decision in *Electric Bond Co.* v. *Comm'n*, 303 U. S. 419, 443.

The management of Public Service did not oppose the Act but, on the contrary, had a leading part in shaping the provisions here in issue (R. 710, 743-745). The President of the United States, in a statement to the press, mentioned Public Service by name and pointed out that the proposed law was not designed to affect such an institution (R. 742).[3] In the Senate, the committee chairman and manager of the bill stated on the floor:

> Let me say quite candidly that there is not any question about the fact that the Public Service Corporation of New Jersey, if I understand correctly, would be exempt under the terms of this bill. (May 29, 1935, 79 Cong. Rec. 8395.)

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[3] Thus the Wall Street Journal for June 20, 1935, reports the President as explaining "that there are certain holding companies wholly intrastate such as Public Service of New Jersey, which was 95% to 98% intrastate. * * * Such companies are exempted from operations of the bill." And the New York Times for the same date reported the President as saying at his regular press conference that Public Service was an example of the type of utility system "approved by the administration and tolerated by the Senate bill."

Nevertheless, without any change in circumstances or conditions except for even further purging itself of all relations with any other holding company, Public Service is now determined by the Commission to be within the Act to the fullest extent. Only by misinterpreting the statute and assuming many crucial facts contrary to the sole evidence has the Commission been able to reach that result.

The court below, in connection with the facts, merely summarizes the Commission's findings (R. 2059-2061). Its decision, therefore, aids neither the parties nor this Court. In *Detroit Edison Co.* v. *Securities & Exchange Commission*, 119 F. (2d) 730 (C. C. A. 6), cert. denied 314 U. S. 618, from which the court below takes its definition of control, there were common officers as well as a common business office.[4] In *Hartford Gas Co. v. Securities and Exchange Com'n*, 129 F. (2d) 794 (C. C. A. 2), UGI and its wholly owned subsidiary owned nearly 22% of the voting securities of Hartford, had entered upon a 25-year guarantee of dividends on stock issued in connection with Hartford's supply of gas and thus controlled its supply of gas, and Hartford's president had been selected from the UGI system. No attempt was made to secure review by this Court. In *Pacific Gas & Elec. Co.* v. *Securities & Exchange Com'n*,

[4] There North American, held by the Commission and the court to control Detroit Edison, had purchased all of the stock of the underlying companies (p. 733), sold them to Detroit Edison in return for a stock interest which at the time of the proceedings amounted to 23.53% (p. 734), designated substantially all of the latter's directors and principal officers throughout its existence (p. 734-735), participated in its financing and acted as its fiscal agent (p. 735), maintained joint offices in New York (p. 735-736, 737), and denied representation on the board to interests holding substantial voting securities (p. 736). There was no dispute as to the primary facts (p. 736) and the court merely held that the sudden abandonment of the common management office for another in the same building was "no showing that its latent power to resume such control has been extinguished" (p. 739). Indeed, the dicta respecting latent control might well have been omitted from the opinion since there was, to all intents and purposes, direct and present control or controlling influence.

127 F. (2d) 378 (C. C. A. 9), there are presented many of the questions here involved. It was first decided by a divided court in favor of the Commission's interpretation, but has since been set for rehearing.[5] A conflict between the circuits is therefore impending, the problems are of great importance both nationally and in the states where these utilities are located, and—particularly in view of the prominence and nature of the Public Service system—the issues are here squarely presented upon undisputed facts and largely documentary evidence.

The central issue of law in this case and the *Pacific Gas* case involves the interpretation of the Act with reference to the effect to be given clause (A) of Section 2(a) (8) providing that "any company 10 per centum or more of the outstanding voting securities of which are * * * owned, controlled, or held with power to vote" by another is a subsidiary of the latter—unless proceedings, such as those here involved, are brought to determine whether any such company is in fact actually controlled. In the present case, the Commission, as set forth in Point I(A) *infra*, has not only misconstrued this provision as the erection of a presumption with the weight of evidence but, in addition, has applied it as a conclusive presumption upon which to combine UGI and United into an entity it calls "UGI-United" so as

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[5] Rehearing granted, June 6, 1942, 130 F. 2d (Advance Sheets, No. 2, p. viii). That case presents many of the legal issues here involved, but the facts there are that North American, owning nearly 18% of the voting securities of Pacific Gas, has a definite and presently exercised agreement for representation on its board (127 F. 2d 378, 383) and the president of Pacific Gas was formerly a senior executive officer of North American (p. 384). No such factors are present in the instant case. There, moreover, in its original opinion the Circuit Court of Appeals could only justify the Commission's order by adding a fourth standard to Section 2(a)(8), saying: "If the Commission found that none of those three conditions were present, it could still deny the application on the ground that there was a necessity or appropriateness that the act be held to be applicable * * * under the necessity clause" (p. 385). The standards of the section are set forth in Point I *infra*.

to enable it to lump their individual Public Service stockholdings and make it appear that an overwhelming block of voting securities is held by a single interest. Only thus is it able, or does it attempt, to imply outside control or controlling influence over Public Service.

Before presenting the argument, two factors should be noticed: First, that Public Service may or may not be held a subsidiary of either UGI or United or both does not mean that either UGI or United will escape the operation of the Act. For, since they hold securities in many and varied utilities of which Public Service is not the principal one, they will be directed to divest themselves of their Public Service holdings in order, in the words of Section 11(b) (1) of the Act, "to limit the operations of the holding-company * * * to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operation of such integrated public-utility system." With reference to both UGI and United, proceedings to that end have already been instituted and it is only a matter of time until they will be ordered to divest themselves of their Public Service stockholdings (see notes 15 and 16 *infra*).

Secondly, so far as the Public Service system in New Jersey is concerned, the present proceeding is crucial since —if the Commission's present method of proceeding is sustained—Public Service will be irrevocably grouped in the "UGI-United" holding company systems and thus subject to further orders dissolving Public Service Corporation and disposing of its operating subsidiaries. Once Public Service is placed in the "UGI-United" basket, the further orders of the Commission will involve merely the essentially discretionary details of dissolution and disposition.

The question, therefore, comes down to whether the Public Service system of New Jersey shall continue to exist or

shall be dissolved because of the purely theoretical possibility of acquisition of control or controlling influence *at some future time* by "UGI-United", which is in fact an impossibility for the many reasons set forth below including the present operation of various provisions of the Act itself upon both UGI and United. And any such dissolution will thus indirectly be brought about in the face of the numerous provisions of the statute designed to safeguard intrastate utility systems such as Public Service. For the central purpose of the statute is the establishment of single integrated utility systems "interconnected or capable of physical interconnection" which "may be economically operated as a single interconected and coordinated system confined in its operations to a single area or region, in one or more states" (Sections 1(c), 2(a) (29), and 11(b)). But Public Service confines its operations essentially to a single state, and subsections (a)(1) and (c) of Section 3 of the Act require the Commission to exempt systems which "are predominantly intrastate in character and carry on their business substantially in a single state."

The findings and opinion of the Commission to the effect that Public Service is subject to the control or controlling influence of "UGI-United" (R. 23-49) are based upon two grounds:

1) Their combined voting power in Public Service affairs (R. 27-31, 45, 46-47, 48); and

2) Their "historical relationship" to Public Service (R. 31-44, 45, 47-48).

Accordingly, the two points of the argument below are addressed to those two subjects. The following argument, however, will treat only of the findings actually made by the Commission on these subjects, despite the fact that the Commission's opinion in several places attempts to make it appear that there is a vast body of evidence upon

which it might have made findings but did not.[6] Such possibility, which does not exist upon the record in any event, is no concern of this Court upon review. "Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence" (*United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489); and, where an administrative "report does not disclose the basic facts on which it made the challenged order," the courts "will not search the record" (*Atchison Ry.* v. *United States*, 295 U. S. 193, 201). See, to the same effect, *Florida* v. *United States*, 282 U. S. 194, 215; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86; *Wichita R. R.* v. *Pub. Util. Comm.*, 260 U. S. 48, 59; *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 464; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511.

I. THE ORDER OF THE COMMISSION IS CONTRARY TO THE PUBLIC UTILITY HOLDING COMPANY ACT, INVOLVES MISINTERPRETATIONS OF PIVOTAL PROVISIONS OF THE ACT, AND THUS PRESENTS RECURRING AND IMPORTANT ISSUES OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

This proceeding involves solely the application of the precise terms of Section 2(a)(8) of the Public Utility Holding Company Act. The essential problem, therefore, is

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[6] Thus, it states that "the record is replete with evidence of United and UGI participation in the applicant's affairs. We think it unnecessary to discuss that evidence at any length, except for two highly interesting instances * * *" (R. 35). It then goes on, however, to state that "the record contains numerous other examples of the influence of United and UGI in the affairs of Public Service" (R. 42) and lists and discusses seven of them (R. 42-44). Again it states that, with reference to "the intimate relationship", the "record is replete with other evidence" (R. 44). And again it states that "the record is replete with instances of the exercise of UGI's and United's control and controlling influence over the applicant from 1903 to the present" (R. 47-48). Finally, it specifically disclaims any attempt or responsibility to make findings respecting evil results of the relationship between UGI-United and Public Service (R. 49). These are mere self-serving anchors to windward, for the Commission has caricatured and distorted every item which it felt could possibly be made to appear the basis of a finding against Public Service.

whether the Commission has undertaken to apply the standards of that statute. Section 2(a)(8) of the statute itself prescribes three standards or questions for decision in a proceeding such as this:

> (i) whether "the applicant is * * * controlled, directly or indirectly, by [a] holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever,"
>
> (ii) whether "the applicant is * * * an intermediary company through which such control of another company is exercised," or
>
> (iii) whether "the management or policies of the applicant are * * * subject to a controlling influence, directly or indirectly, by [a] holding company (either alone or pursuant to an arrangement or understanding with one or more other persons)" and
>
> in the latter event whether the controlling influence exercised is such "as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies."

A. The Commission has unlawfully, and without evidence, taken the sum of the stock holdings of diverse interests in order to make it appear that a controlling block of voting securities is held by a single interest which the Commission calls "UGI-United".

It is apparent that such control, or controlling influence, as the Commission apprehends rests upon stock representing 42.3% of the voting securities of Public Service, which the Commission stresses at the outset and conclusion of its opinion (R. 27, 28, 45) and which represents "the combined holdings of UGI * * * and United" (R. 28). Without that comparatively large percentage, implications

of control would disappear on this record. The Commission attributes the ownership of this comparatively large block of stock to an entity described in its "historical relationship" discussion as "UGI-United" (R. 28-45) and in its discussion of voting power at the beginning and conclusion of its opinion as "UGI and United" (R. 28-30, 45-49). The Commission invents or assumes this "UGI-United" entity, and it is this assumption which is the heart of its decision. In the court below, italicizing its words, the Commission made this very point—"that this Court may dispose of this case upon the one overpowering circumstance of stock ownership alone" (Comm'n Brief, p. 18).

That United holds 10% or more of the voting securities of UGI does not make UGI a subsidiary of United so far as their relation to Public Service is concerned. It is true that the Public Utility Holding Company Act defines subsidiary as "any company 10 per centum or more of the outstanding voting securities of which are * * * held" by another, but the very purpose of the remainder of the section and proceedings such as the instant one is to set aside that rule of thumb upon the filing, as here, "of an application * * * in good faith" (Section 2(a)(8)). After the filing of such an application and the submission by applicant of a prima facie case of its independence and freedom from control, the issue is at large until determined by the Commission upon the record.[7] That this

[7] The situation is no different from the initiation of new rates in lieu of those previously filed and presumptively lawful and reasonable. In such a situation this Court has said, speaking through Mr. Justice Cardozo, that "all that the [party] has done is to initiate a schedule which must be upheld as lawful unless adequate reasons are presented for setting it aside." *United States* v. *Chicago etc. R. Co.*, 294 U. S. 499, 510.

For the general principle Thayer, Preliminary Treatise on Evidence, p. 357, quotes as "a clear expression" the language of Lord Justice Bowen: "In every lawsuit somebody must go on with it; the plaintiff is the first to begin, and if he does nothing he fails. If he makes a *prima facie* case, and nothing is done by the other side to answer it, the defendant fails." *Abrath* v. *No. E. Ry. Co.*, 32 W. R. 50, 53.

is so is emphasized by the specific provision of the Act that the mere institution of the proceeding "shall exempt the applicant from any obligation, duty, or liability imposed in this title * * * until the Commission has acted upon such application" (Section 2(a)(8)). Congress has carefully and intentionally refrained from imposing any yardstick, once the issue is raised, because 10% interests might be held by ten different parties, 20% by five, or 30% by three. And there is an infinite variety of further combinations and factors which may preclude control or controlling influence in any one interest or group.[8] All that Congress has done is to fix a figure beyond which any party affected must initiate a proceeding of the type here involved.

The question here, therefore, is not whether United owns 10% or more of the voting securities of UGI but whether *in fact* United controls UGI or otherwise combines with UGI to control Public Service. As the matter was explained on the floor of the Senate by the manager of the measure,

> Even if they hold 40% of the stock of a company they may come before the Commission and produce evidence that they are not actually in control of the company. (79 Cong. Rec. 8397.)
>
> Unless I control that company I am not a holding company under the terms of this bill. The mere ownership of the 10 per cent of the stock does not of itself make him a holding company, because unless he actually controls the company he is not a holding company. (79 Cong. Rec. 8439.)

The issue of fact as to control or controlling influence by United over UGI was not raised by the Commission either

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[8] An illustration is *In the Matter of Detroit Edison Company*, 7 S. E. C. 968, aff'd 119 F. 2d 730, cert. denied 314 U. S. 618, wherein North American held 19.28% of the voting securities of Detroit Edison and American Light & Traction Company (a subsidiary of United twice removed) held 20.27%. The Commission held that North American, rather than United or American Light, controlled Detroit Edison.

before or at the hearing. Public Service, on the other hand, submitted its proof of independence from any outside holding company influence. The Commission does not state or find that, in the words of the statute, there is any "arrangement or understanding" or any other "means or device whatsoever" by which UGI and United control Public Service.[9] It relies solely upon its own assertion that "UGI is admittedly a subsidiary of United" (R. 27). But petitioner has never, and does not now, admit that UGI is a subsidiary of United in any sense relevant in this proceeding; and there is no evidence in the record as to the actual relations between the two. They also deny any such control as specified by the statute (R. 1116-1118, 1120-1122). There is therefore no basis whatever in the record upon which the Commission is justified in lumping UGI with United to form an entity controlling Public Service.

The Commission, therefore, has made an assumption. In the words of Mr. Justice Cardozo,

> From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. (*Ohio Bell Tel. Co.* v *Comm'n*, 301 U. S. 292, 302; and see to the same effect *West Ohio Gas Co.* v. *Comm'n* (*No. 1*), 294 U. S. 63, 70.)

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[9] This failure to explain the reason for uniting UGI and United as a group entity is also relevant in connection with Point I(B), *infra*, that the Commission has failed to make the necessary findings. The situation is precisely comparable to group rates, in which connection this Court without dissent has said: "The Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order." *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86.

Assuming that the Commission may have relied upon information it happened to have acquired elsewhere does not change the situation for, in the words of Mr. Justice Brandeis, the parties "were left without notice of the evidence with which they were, in fact, confronted." *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 289. Any other rule "would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute." *Interstate Com. Comm.* v. *Louisville & Nash. R. R.*, 227 U. S. 88, 93.

The statute here does not even erect a presumption—much less one having conclusive or even evidentiary effect.[10] Nor, as this Court has recently held without dissent, is it within the prerogative of an administrative agency to do so:

> The vice of the regulation * * * is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power. (*Miller* v. *United States*, 294 U. S. 435, 440.)

And even if there were or could be a presumption, its effect would be no more than to require petitioner to present a prima facie case—as it has done—after which the issue would be justiciable solely upon the record as in any other

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[10] Had Congress attempted to do the latter, there would have been presented constitutional questions as to validity such as this Court has often considered. In this connection, a conclusive presumption that a gift within two years of death shall be taken as one made on contemplation of death has been held invalid. *Heiner* v. *Donnan*, 285 U. S. 312, 329. And according the weight of evidence to statutory presumptions relating to railroad accidents or bank insolvencies has been denied validity. *Manley* v. *Georgia*, 279 U. S. 1, 6; *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639, 642-644; *Mobile etc. R. R.* v. *Turnipseed*, 219 U. S. 35, 43.

case.[11] But that the Commission in terms relied upon an assumed presumption is apparent from its statement that it "may properly treat UGI and United as one" upon the authority of its own previous decision in *Manchester Gas Company,* 7 S. E. C. 57, 63, where it held that the stockholdings of United in UGI bring the latter "presumptively under the control of The United Corporation" (see also note 13 *infra*).

As is apparent on the face of its opinion, however, the Commission has here not only invented an assumption or presumption but has taken it as having conclusive effect. It first states the 10% or more holdings by each UGI and United in Public Service and then states that the latter "is thus a subsidiary" (R. 27). Upon the same basis it assumes that "UGI is * * * a subsidiary of United" (R. 27). Thus it has not only taken an assumed presumption in determining the relations between Public Service and UGI, but it has done the same again with reference to the relations between UGI and United. In so doing it has founded one presumption upon another.[12]

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[11] A "presumption is not evidence and may not be given weight as evidence." *New York Life Ins. Co.* v. *Gamer,* 303 U. S. 161, 171. "The legal effect of the presumption was to cast upon the * * * company the duty of producing some evidence * * * whereupon the inference was at an end." *Atlantic Coast Line* v. *Ford,* 287 U. S. 502, 507. The only legal effect of a presumption "is to cast upon the * * * company the duty of producing some evidence * * * . When that is done the inference is at an end, and the question * * * is one * * * upon all of the evidence." *Mobile etc. R. R.* v. *Turnipseed,* 219 U. S. 35, 43. This Court has only recently summarized the law as follows:

> Once the [party] has carried his burden by offering testimony sufficient to justify a finding * * * the presumption falls out of the case. It never had and cannot acquire the attribute of evidence * * *. The issue must be resolved upon the whole body of proof pro and con." *Del Vecchio* v. *Bowers,* 296 U. S. 280, 286-287.

[12] "One presumption cannot be built upon another." *Looney* v. *Metropolitan Railroad Co.,* 200 U. S. 480, 488. Proof may not be made "by piling inference upon inference, and presumption upon presumption." *United States v. Ross,* 92 U. S. 281, 283.

Its implied reasoning is apparently that

1) United is conclusively presumed to control UGI;

2) Therefore the stockholdings of United and UGI may be added together to arrive at the substantial total of 42.3% of the voting securities of Public Service;

3) The Commission finds that 42.3% of the voting securities is present potential control or at least a controlling influence; and

4) Therefore, Public Service is a subsidiary of "UGI-United".

That this is the theory upon which the Commission has proceeded is demonstrated in other proceedings [13] and admitted in its brief in the court below, where it said:

> Any other course would require the Commission to try a number of issues concerning control in each case even though the companies in the higher layers of the holding company pyramid had no applications pending for a determination of their status among themselves, and were not parties to applicant's proceeding. (Brief for Respondent, p. 13.)

And by way of footnote at the same place it stated that:

> It is doubtful whether petitioner may collaterally attack the status of UGI or United under the Act. Sec-

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[13] In *The Matter of Manchester Gas Company*, 7 S. E. C. 57, 63, the Commission reasoned as follows: "The United Corporation holds beneficially approximately 26 per cent of the outstanding voting securities of UGI. No application is pending for an order declaring UGI not to be a subsidiary of The United Corporation, nor has any such order been issued by this Commission. The foregoing facts bring The United Corporation within the definition set forth in Section 2(a)(7)(A) of the Act, as a holding company for UGI, and make UGI a subsidiary of The United Corporation under Section 2(a)(8)(A) and presumptively under the control of The United Corporation. These facts, together with the fact that MGC is, according to our finding herein, a subsidiary of UGI, point to the conclusion that MGC is indirectly subject to a controlling influence by The United Corporation." Public Service was, of course, not a party to this proceeding.

> tions 2(a)(7) and 2(a)(8), prescribing the exclusive statutory procedure for the disestablishment of subsidiary status under the Act, permit only United or UGI to file an application for an order declaring UGI not to be a subsidiary of United.

But no collateral attack is here involved, since the present proceeding directly involves the relationship of UGI and/or United to Public Service, and the statute requires the Commission to determine the fact. UGI or United may never have occasion to test their relationship, and their forbearance cannot bind Public Service.

Despite the foregoing, the court below ignored this crucial issue and held that (R. 2062):

> The Commission did not rest its decision upon any presumption arising from the ownership of 10% of voting stock of a utility company by a holding company but relied entirely upon evidence presented at the hearing before its trial examiner as to the effect of the stock ownership upon the relations of the three corporations.

Thus the Circuit Court of Appeals committed basic errors (1) in holding that the Commission had relied upon evidence as to the actual relation between United and UGI, (2) in impliedly holding that there was substantial evidence upon which the Commission could so rely, (3) in failing to hold that the Commission had invented a conclusive presumption predicated upon United's ownership of 10% or more of the voting securities of UGI, and (4) in failing to hold that such a presumption is both unauthorized by the Act and violative of the due process clause of the Fifth Amendment.

The vice of the Commission's mode of procedure is (1) the statute, which provides for a trial of the issue, is ignored, (2) a presumption is not only invented by the

Commission but is regarded as conclusive of the actual relation of United to UGI, and (3) upon this assumption the sum of their stockholdings is utilized to find control in the fictitious entity "UGI-United." The result is to set at naught the record and render the hearing required by law a mere formality. The Commission, therefore, has made no attempt to find or decide in accordance with the "actualities in such intercorporate relations." *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146. Such arbitrary procedure manifestly requires the exercise of the supervisory power of this Court as to the issues of law so presented.

Unless the Commission can sustain its invention of "UGI-United" upon the record, the case must go back to the Commission for further proceedings, for the present findings do not relate to either UGI or United singly and as stated above there is no evidence upon which to predicate findings as to them jointly. It is unnecessary to prognosticate what the Commission might lawfully have found as to the relation between Public Service and United alone, or between Public Service and UGI alone, for the administrative power has not been exercised with reference to either of those questions. For this Court to do so would usurp the original jurisdiction of the administrative agency. Upon remand—as sought through this Petition—the Commission may attempt to prove one or more of three propositions:

> 1) That *in fact* United actually controls or has present power to exercise controlling influence over UGI so that their stock holdings in Public Service may be taken as held by a single interest, or that UGI and United act jointly with reference to Public Service pursuant to some understanding, arrangement, or other device;

2) That *in fact* United alone controls or has present power to exercise controlling influence over Public Service; or

3) That UGI alone and *in fact* controls or has present power to exercise controlling influence over Public Service.

Petitioner is confident that the Commission cannot sustain any one of those propositions, and by this Petition it seeks an opportunity for a hearing and findings on those issues.

B. The Commission has made none of the findings required by the Act.

Illustrative of the arbitrary nature of the Commission's treatment of the case is the circumlocution by which it reaches its decision. It makes no affirmative finding or conclusion, ultimate or otherwise. In the preliminary statement of the question presented, the Commission puts it as whether Public Service "has demonstrated that it is not controlled", etc. (R. 27); and in its conclusion states only that petitioner "has not sustained the burden" (R. 45-46) arbitrarily imposed upon it by the Commission and that therefore the Commission "cannot find * * * that [petitioner] is *not* controlled by, or subject to the controlling influence of," two holding companies which the Commission treats as one (R. 49).

In so failing to state in affirmative form an answer to any one of the four questions propounded by the statute the Commission is not referring to any failure on the part of petitioner to come forward with substantial evidence and make a prima facie case respecting its independence. That evidence is in the record in the form of the lack of common personnel, facilities, or operations as well as the lack of any control or attempt at control or controlling influence by any outside interest whatever.

The novel position of the Commission, therefore, is that it may decide this proceeding without the positive findings—either basic, subsidiary, or ultimate—required by the Congressional mandate of the statute. It declines to make affirmative findings solely because it chooses to say that petitioner "has not sustained the burden of proving" its independence. None too sure of the soundness or essential merit of this evasive tactic, it states, however, that it *could* make affirmative findings—that the facts "afford" a "justification" for, and that the record is "replete" with evidence upon which the Commission might make, findings of control if it chose to do so upon the basis of the stockholdings of "UGI-United" (R. 47-48). But until the Commission does so, petitioner is deprived, not only of a specific and intelligible decision, but of any effective opportunity for judicial review.

This Court has frequently announced that, in the absence of a "definite finding" upon an essential question, it

> will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. (*Atchison Ry.* v. *United States*, 295 U. S. 193, 201-202; and to the same effect *United States* v. *Pyne*, 313 U. S. 127, 130; *United States* v. *Chicago, etc., R. Co.*, 294 U. S. 499, 505, 511; *United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489.)

Findings must be "specific on [the] ultimate and determinative issue" (*United States* v. *Pyne*, 313 U. S. 127, 130). If an administrative agency may make "vague findings", "then statutory rights will be whittled away" (*United States* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489). In the words of Mr. Justice Brandeis, statutes do "not confer

upon the Commission legislative authority'' but only defined authority and

> its finding to that effect is essential * * * and * * * the order may be set aside unless it appears that the basic finding was made. (*United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454, 462-463.)

The Commission, if it had intentionally attempted, could not have more artfully stated its case in its opinion so as to make its precise position equivocal. Thereby, however, it runs afoul of the rule as stated by Mr. Justice Cardozo:

> We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. * * * The difficulty is that [the Commission] has not said so with simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. (*United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 510.)

And the Commission's admission that it has not purported to find the issue—that the record affords ''justification'' and that it would ''have no hesitancy in affirmatively finding'' the issue (R. 46, 47)—brings its procedure even more precisely within the recent condemnation of this Court.[14]

What has been said so far relates only to the ultimate conclusions. The Commission makes no attempt whatever to explain its implied conclusion by ''a suitably complete

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[14] "A statute expressive of such large public policy * * * must be broadly phrased and necessarily carries with it the task of administrative application. * * * The Board determined only the dry legal question of its power. * * * The administrative process will best be vindicated by clarity in its exercise. * * * It will avoid needless litigation and make for effective and expeditious enforcement." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194-197.

statement of the grounds of * * * determination" (*Florida* v. *United States,* 282 U. S. 194, 215) in accordance with the mandate of the statute that there shall be "findings of the Commission as to the facts" (Section 24(a)) with reference to "control" or "controlling influence" by any "arrangement or understanding" or through "intermediary persons" or by any "device" (Section 2(a)(8)). Not only is there no positive finding of control or controlling influence, but there is no specification as to what means or methods are utilized to effectuate an implied control or controlling influence. Petitioner's objection is not technical, for without even the ultimate finding in positive terms—to say nothing of subsidiary findings—the issue is at large and even this Petition must search the record and compare the vague and varied assertions of the Commission's opinion.

C. The Commission has ignored the statute both in holding that there is a possibility of future control or controlling influence by "UGI-United" and in construing such a possibility as sufficient to render Public Service a present subsidiary.

Taking the sum of the stockholdings of the fictitious entity "UGI-United", the Commission does not even imply present "control or controlling influence" but merely the *possibility* of future acquisition of such control or controlling influence. Petitioner does not suggest that any company with present control of, or controlling influence over, another—whether exercised or not—does not render the latter a subsidiary within the meaning of the statute. But the point is that an analysis of the law and the facts here presented discloses that there is no present ability of UGI or United to exercise control or controlling influence over Public Service.

Both the court below (R. 2062-2063) and the Commission interpret the statute as meaning something less than control. The Commission has heretofore stated that "Congress meant by the term 'controlling influence' something less in the form of influence over the management or policies of a company, than 'control' of a company." *In the Matter of H. M. Byllesby & Company et al.*, 6 S. E. C. 639, 651. It has, as a matter of fact, departed from the position taken on the single occasion when this statute was before this Court for argument, for it there said, with italics:

> A holding company, by express definition * * * is a company which *actually controls* operating companies, and not a company which merely has an investment in operating companies. Conversely, a subsidiary company, by express definition * * * is a company *actually controlled* by the holding company, and not simply a company in which the holding company has a substantial interest. (*Electric Bond & Share Co.* v. *Securities and Exch. Comm.*, Br. for Resp., Appendix A, p. 6, decided by this Court in 303 U. S. 419.)

If there is any difference between "control" and "controlling influence" it must be that the former is a formal power of control while the latter may arise through circumstances such as financial, operating, or other close relationships amounting to power of control. But that "control" and "controlling" were intended to mean actual control is manifest from the report of the Senate Committee, where the provisions here relevant were "completely rewritten in the interests of clarity and definiteness" to substitute "controlling influence" for the previous provision specifying "material influence"; and it was explained that a corporation is a holding company and conversely another is its subsidiary only if "the Commission finds that [the former] exercises a 'controlling influence' over the management or

policies'' of the latter (Sen. Rep't No. 621, 74th Cong., 1st Sess., p. 5). The Senate Committee Chairman in charge of the measure stated on the floor that ''the Commission is directed to make a finding and to exempt them if they are not actually controlling the company as the word 'control' is defined in the bill'' (79 Cong. Rec. 8397) and that ''unless he actually controls the company he is not a holding company'' (79 Cong. Rec. 8439).

1. In the ordinary corporate affairs of Public Service, the voting power of ''UGI-United'' is illusory.

It is true, of course, that as compared with the holdings of UGI and United the voting securities of Public Service are widely held. But, despite the Commission's attempt to minimize the fact, the next thirty stockholders may vote more than 8% of the stock of Public Service (R. 23) and are substantial and independent interests quite capable of protecting their investments (R. 1396-1399). Many Public Service shareholders are institutional investors (R. 164) who receive more detailed reports than anyone else respecting the operations of Public Service (R. 685-686). While it is true that in recent years, except 1941 when United's stock was not voted (R. 1044), UGI and United have contributed slightly more than half of the stock actually voted at stockholders' meetings (R. 29), that has been true only since 1929 when the stock held by United came into the picture (R. 1390-1391) and neither the UGI nor United stock has been voted except upon form proxies solicited by and given to the management in the usual course and without strings or instructions (R. 177, 189-191, 280-282, 1044-1045, 1066-1067).

With 85% of the voting shares represented at any stockholders' meeting, as the only witnesses who testified said could be secured (R. 167, 302, 992), ''UGI-United'' could be outvoted. The Commission therefore finds it necessary

to prognosticate as to the event and result of a proxy fight. It states that, when two-thirds of the shares of each class were necessary at a meeting in 1936 with reference to the reorganization of the Public Service transportation subsidiaries (see Appendix, pp. 21-22) only 79.1% of the total voting shares were secured; and it calls this an "extraordinary" effort (R. 29-30, 47). But the difficulty there was getting in the preferred stock (R. 163), it wasn't a "proxy fight" (R. 178, 932), no special effort was made with reference to the common stock nor was any very unusual or long-sustained effort made in any event (R. 1040, 1067-1072), and the effort ceased "when we received a sufficient number of proxies" (R. 168). In view of the essentially local nature of its business and the residence of a majority of its shareholders in New Jersey, any attempt of "UGI-United" to seize control would obviously, in the words of McCarter, "create nothing less than an uprising in New Jersey" (R. 295, 294-298). In such an event, McCarter testified that he could bring out "pretty close to 100 per cent stock vote" (R. 302) and Zimmermann of UGI admitted that McCarter might bring out "90 per cent if he went after it" (R. 992). It is thus far from true that, as the Commission would have it, "the stockholdings of UGI and United * * * make it almost certain that United and UGI would prevail in any such conflict" (R. 30). In any event, there would be a conflict before "UGI-United" could secure control and—as set forth *infra*—neither UGI nor United is in a legal position to undertake such a conflict.

Again, the Commission finds that "UGI can at any time it desires obtain representation on applicant's board" (R. 48). That is no more true than its power in any other affairs of Public Service, since there is no cumulative voting. Moreover, mere representation is not control and, since only a third of the directors are elected every three years, it would take a substantial period for anyone to ob-

tain control through such representation even if it were possible to do so (R. 294-295, 1150-1152). Every argument or reason put forward by the Commission, therefore, is merely theoretical and anticipatory. Against such possibility, if it in fact exists, the Act itself provides separate safeguards as set forth below in Point 4.

2. Instances requiring a two-thirds vote of shareholders, in which the voting power of "UGI-United" might be effective, are insignificant.

The Commission next discusses the effect of the joint exercise of the right to vote this 42.3% block of stock in matters requiring a two-thirds vote of stockholders, and finds that "UGI-United" could *prevent* the following (R. 31, 47):

> (1) "Changes in name"—but Public Service has spent forty years building up good will under its present name, and certainly this matter does not require the imposition of the death sentence and other sanctions of the Act;
>
> (2) "Changes in * * * nature of business"—but no public harm can come from Public Service remaining, as it is, solely a holding company, predominantly intrastate, and as such entitled to an exemption under Section 3(a)(1) of the Act and Rule U-2 of the Commission;
>
> (3) "Changes in * * * objects or powers"—but here again nothing contrary to the public interest can come from leaving Public Service in its present business, for which it has ample authority;
>
> (4) "Extension of corporate existence"—but all of the corporations in the Public Service system already have perpetual existence;
>
> (5) "Increase or decrease of capital stock," "changes in par value, classes of stock, number of outstanding

shares of any class," "creation of preferred or other special stock," and "provisions for readjustment or reclassification of capital stock"—but there is sufficient authorized but non-issued stock of each of the classes to provide for financing for years to come without any further amendments, and the organization has reached the stage where there is no need for any of the possible changes listed by the Commission.

(6) "Provisions for funding or satisfying rights in respect to dividend arrearages"—but there are no such arrearages, which could only accrue in connection with preferred stock in the Public Service system; the record of earnings indicates that none may be anticipated in the future; and dividends have been paid regularly since 1904 even on common stock;

(7) "Changes in existing provisions for the regulation of the management and affairs of the corporation, and any other amendments, changes, or alterations as may be desired"—but existing provisions are broad and general so that there is no occasion for stockholders' action; and

(8) "Any merger or consolidation"—but Public Service, as shown at pages 3-6, 20-22 of the Appendix, has perfected its corporate structure so that there will in all likelihood never be occasion for the exercise of this power.

Of the foregoing, only the last is repeated in the Commission's conclusions (R. 47). Moreover, none of these things, even if they ever come to a vote, are such as would provoke controversy or move any interest to take the spotlight by attempting the "absolute legal veto" which the Commission mentions. If the management and New Jersey shareholders proposed any such actions, they would obviously be approved or disapproved on their merits.

3. The stockholdings of "UGI-United" have been so sterilized by the Public Utility Holding Company Act that "UGI-United" can wield no influence upon Public Service.

Irrespective of the result of the present proceeding, the Commission has heretofore determined that UGI is precluded by the Public Utility Holding Company Act from continuing to hold its 28.4% of the voting securities of Public Service.[15] It has done the same with respect to the 13.9% holdings of United in Public Service.[16]

Moreover, both UGI and United are registered holding

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[15] The Commission in March, 1940, instituted "death sentence" proceedings (Release No. 1593), on May 23, 1940, agreed to furnish tentative conclusions (Release No. 2065) and in January, 1941, filed its tentative conclusions and an order reconvening the hearing (Release No. 2500) accompanied by a report of the Public Utilities Division (the latter was amended and refiled on March 27, 1941). On February 21, 1941, an order was entered for UGI to show cause why it should not forthwith be directed to divest itself of holdings in certain companies (Release No. 2571), and on April 15 and July 31, 1941, orders were filed requiring divestiture (Release Nos. 2692, 2319). Thus, in precisely applicable situations, UGI has already been held to be required to divest its interest. On April 9, 1941, the Commission issued its order for UGI to show cause why it should not be required to divest itself of its interest in Public Service and on April 29, 1941, the matter was reserved for future consideration. On September 3, 1942, after the determination of the present proceeding by the Circuit Court of Appeals, the hearing respecting divestiture by UGI was reconvened (Release No. 3778). The matter has been heard, argued, and is awaiting decision by the Commission.

By these decisions of the Commission, and also those in the *North American* case (Release No. 3405), *Electric Bond and Share* case (Release No. 3750), and *Engineers Public Service* case (Release No. 3796), these registered holding companies will be required to divest themselves of their holdings in companies like Public Service irrespective of whether the latter are held finally to be subsidiaries or not.

[16] On March 5, 1941, United filed with the Commission its plan of divestment which included its Public Service holdings (Release No. 2596), on July 28, 1941, the Commission issued its order to show cause why divestiture should not be ordered and for consideration of the plan filed (Release No. 3015), and the matter has been heard, argued, and is awaiting decision.

companies. They are therefore precluded meanwhile by the Public Utility Holding Company Act itself from:

1) Acquiring any further holdings in Public Service (Section 9(a)(2));

2) Selling their Public Service stock except with the consent of the Commission (Section 12(d));

3) Negotiating, entering, or taking any step in the performance of "any transaction not otherwise unlawful under this title" with Public Service except with the consent of the Commission (Section 12(f) and (g));

4) Entering or taking any step in the performance of "any service, sales, or construction contract" with Public Service without the consent of the Commission (Section 13(e)); and

5) From failing to keep such records or make such reports as the Commission may require with respect to their Public Service holdings (Sections 14 and 15).

Thus the Commission has not only held in effect that Public Service is controlled by "UGI-United" which are already in the shadow of divestiture so far as their Public Service holdings are concerned, but by virtue of the operation of the Public Utility Holding Company Act itself their stockholdings are—or at least may be if the Commission so desires—effectively sterilized. Even though they may be permitted to vote, they cannot without the consent of the Commission receive or acquire any benefit from such vote or otherwise.

4. *The Act itself lays down safeguards in the event that control or controlling influence by "UGI-United" should develop, and thus recognizes that the mere possibility of such future control is insufficient to render Public Service a present subsidiary.*

There are at least three further safeguards which the Public Utility Holding Company Act itself lays down in the event that actual control of Public Service or controlling influence by "UGI-United" should develop.

(1) First is the provision of Section 2(a) (8), under which this proceeding is brought, that

> As a condition to the entry of, and as part of any order granting such application, the Commission may require the applicant to apply periodically for a renewal of such order and to file such periodic or special reports regarding the affiliations or intercorporate relationships of the applicant as the Commission may find necessary or appropriate to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective.

(2) Second is the further provision of Section 2(a) (8) that the Commission may both (a) "revoke the order declaring [Public Service] not to be a subsidiary company" or (b) "modify the terms of such order whenever in its judgment such modification is necessary."

(3) Finally—even though Public Service is not a subsidiary—UGI, United, and Public Service are each nevertheless affiliates of the others (Section 2(a) (11)). As such, as to each other they are forbidden by subsections (f) and (g) of Section 12 of the Act—

> to negotiate, enter into, or take any step in the performance of *any transaction not otherwise unlawful* under this title, * * * in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circum-

vention of the provisions of this title or the rules and regulations thereunder. (Emphasis supplied.)

In other words, it is unnecessary to discuss the further provisions of the Act since these subdivisions alone bring within the ambit of the Commission's authority "any transaction not otherwise unlawful."

There is thus no reason whatever for the Commission to subject Public Service to the "death sentence" provisions of the Act because of mere theoretical suspicion that either UGI or United may at some future time be able to acquire and exercise control or subject Public Service to their controlling influence. The Act itself has wisely provided that, should such an event occur, the Commission is fully armed to protect the public interest.

II. IN AFFIRMING THE COMMISSION'S STATEMENTS AS TO THE "HISTORICAL RELATIONSHIP BETWEEN PUBLIC SERVICE AND UGI-UNITED"—WHICH ARE CONTRARY TO THE SOLE EVIDENCE—THE COURT BELOW HAS SO FAR SANCTIONED A DEPARTURE FROM DUE PROCESS OF LAW AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Although the Commission's opinion, in its findings and reasons, begins and concludes with statements as to the voting strength of "UGI-United" in Public Service affairs (R. 27-31 as set forth in Point I *supra*), the bulk of its findings and opinion is based upon the stated premise that "evidence of the historical relationship between Public Service and UGI-United over a period of 35 years is of material significance and has a material bearing on the present relationship of these companies" (R. 45.)

As in its discussion of voting strength, the Commission has here invented a new entity—"UGI-United"—to wield the "controlling influence" it apprehends. However, because the relationship of UGI to Public Service is very dif-

ferent from that of United, they must necessarily be treated separately. This development, rather than the confused and commingled statement of the Commission, is made necessary not only because the nature of the relationship of UGI or United to each other and to Public Service has been different at different times but because, taken as a whole, the relationship springs from different sources and, such as it is, differs in character. Still a third category of personnel is injected into the picture in some of the Commission's statements—i.e., the Morgan affiliated banking house of Drexel & Company—so that it will also be necessary to describe separately their relations to Public Service (Appendix, pp. 71-73).

In the main, such contacts as there were between Public Service and either UGI or United came about through, and involved nothing more than, the following interlocking directorships which never meant control or controlling influence by the participants, had been dwindling for 30 years, and have been completely non-existent for some years:

Years	Total directors	Directors not affiliated with "UGI-United"	Directors also affiliated with UGI	-or- United	Percent of directors not affiliated with UGI or United
1903-1908	24	19	5		79% plus
1908-1914	21	16	5		76% "
1914-1917	21	17	4		81% "
1917-1923	18	14	4		77% "
1923-1924	15	12	3		80% "
1924-1925	18	15	3		83% "
1925-1930	15	13	2		86% "
1930-1934	15	13	1	1	86% "
1934-1935	12	10	1	1	83% "
1935-1938	12	11	1	0	91% "
1938-....	12	12	0	0	100%

Thus, since the very beginning of Public Service not less than three-fourths of its directors have at all times been independent of affiliation with UGI or United. Common directorships, in any event, do not mean control *over* Public Service any more than they mean control *by* Public Service over the others. The evils of interlocking directorates are governed by separate statutory provisions not here involved, with which Public Service has more than complied.[17]

A. The "historical relationship" between UGI and Public Service is indicative of no control or controlling influence by the former and the Commission has found no such control or influence.

UGI holds an "omnibus" charter from Pennsylvania and, since the 1880's, as its principal business has owned investments in utilities scattered over a good part of the country (R. 977-980, 986-987). While its principal activity has been the holding of utility investments, it has also owned certain patents connected with the gas and heating industry (R. 980). A Commission report on this company on January 22, 1941, with reference to the application of the Holding Company Act to it (Release No. 2500) states that its first interests were in patents for the manufacture of water gas; that "within a decade of its organization it owned securities of gas companies in communities in many states of the Union"; and that

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[17] It may be noted that the Commission in its opinion repeatedly takes the position or intimates that resignations from the board of Public Service after the enactment of the Public Utility Holding Company Act, for any reason whatever, are due to some sinister motive (R. 33, 34, 35, 45) and finds that, "in this context, the absence of interlocking directors is not entitled to any great weight" (R. 48). But no reason is to be perceived why any person or corporation may not bow to the "new philosophy abroad that these interlocking directorships should not continue" as was done here before the Utility Act was passed, or comply with law (R. 318, 322-323, 441, 952-955).

> The electric facilities [of Public Service] * * * constitute a major enterprise in their own right. Their operations at least in recent years, have not been in any way related to The United Gas Improvement Company system either for financing, use of personnel or any other operating functions except for the interchange of excess energy and the use of the facilities of Public Service Corporation of New Jersey for the delivery of power to the Pennsylvania Railroad Company. (*In the Matter of The United Gas Improvement Company and Its Subsidiary Companies, Respondents*, File No. 59-6, pp. 2, 118, 119.)

The same is there said of the gas operations of Public Service.

The source of the relationship between Public Service and UGI was the desire of the organizers of Public Service to acquire the stock of United Electric Company of which UGI owned 50% and to secure long-term leases of two gas companies and one gas-electric property which were controlled by UGI, as shown by the plan of organization (R. 1123, 1142). The plan did not call for any capital investment by UGI, though it had a right to subscribe for a part of the capital stock at par upon the same terms as the stockholders of the four street railway companies and the holders of the other stock of United Electric Company and South Jersey Gas, Electric, and Traction Company (R. 1123). UGI did subscribe for a part of its quota of the stock of Public Service, taking only 25,000 shares at par and paying therefor $2,500,000 (R. 32, 222, and Applicant's Exhibit 56 not printed). Thereupon, as shown in the table above, five persons connected with UGI were elected to the first Public Service board which consisted of 24 members; and their number was gradually reduced to one in 1930 and since 1938 there have been no common directors.

The Commission does not flatly say that UGI originated or organized Public Service, or that the latter is its pawn or tool, or that UGI dictates its policies. All that the Commission says is that certain intercorporate contacts are "of material significance" (R. 45). The undisputed facts with reference to each of the following ten items, which are all that the Commission mentions, are set forth in the Appendix at pages 22-65:

(1) The Commission's statements respecting the role of UGI in the organization of Public Service (R. 31-33) are entirely unfounded, since UGI participated only as *one* of the holders of securities in four of the nine properties which became Public Service (Appendix, pp. 22-29);

(2) The Commission's statements respecting UGI participation in the management of Public Service (R. 33-35) when analyzed mean nothing more than a dwindling minority representation on the Public Service board (Appendix, pp. 29-37);

(3) The Commission's misstatements respecting UGI participation in the struggle of Public Service to secure a contract to supply the Pennsylvania Railroad with electricity for its operations in New Jersey (R. 35-39) are founded upon nothing more than McCarter's activity in enlisting the aid of all his board members and other friends on behalf of Public Service (Appendix, pp. 38-48);

(4) The Commission's description of United Engineers and Constructors, Inc. (R. 39-42), is founded upon nothing more than a joint venture into the construction business, in which McCarter forced a larger share from UGI than originally agreed upon and then withdrew as a result of the adversities of the depression of 1929 upon the construction business but with a substantial profit (Appendix, pp. 49-55);

(5) The Commission's assertion that "UGI has been particularly active throughout the years in applicant's

financing" (R. 42) is without foundation since, aside from the early years and during the first World War when on a few occasions UGI participated with others in minor financing, UGI has participated in no Public Service financing subsequent to 1919 (Appendix, pp. 55-57);

(6) The Commission's assertion that "UGI has acted for Public Service in the acquisition of utility properties" (R. 42) rests solely upon a single three-cornered transaction whereby in order to secure the Geist properties in New Jersey (which McCarter had long been attempting to secure) and in Delaware (which UGI wished to secure) a three-party deal was made necessary because Geist refused to sell either the New Jersey or Delaware properties singly (Appendix, pp. 57-59);

(7) The Commission's finding that UGI "took a very active part in connection with proposals for the reorganization of applicant's transportation subsidiaries" (R. 43) is correct only in that the single common director between UGI and Public Service participated both as a director in the latter and later as the representative of UGI-held shares (Appendix, pp. 59-60);

(8) The Commission's assertion, with reference to natural gas, that UGI and Public Service "both vigorously opposed" its introduction and "UGI took the lead in negotiations * * * on behalf of itself and" Public Service (R. 43) is without any foundation since UGI did not oppose it but on the contrary contracted for it and Public Service, upon its own studies, concluded that it was not commercially feasible (Appendix, pp. 60-62);

(9) The Commission's assertion that, as between UGI and United, "joint purchasing continued until 1939" (R. 43) is founded solely upon the use of a common subordinate purchasing agent in the earlier years and certain group discounts in connection with a very small fraction of Public Service purchases

wherein manufacturers solicited Public Service and UGI and, as an inducement, permitted the separately made purchases of each to be totaled in calculating volume discounts—a practice which was terminated under statutes not material here (Appendix, pp. 62-64); and

(10) The Commission's conclusion that Public Service reports to UGI "in considerable detail" and in a fashion "not furnished to anyone else in the same form or detail" (R. 43-44) is entirely without substance (Appendix, pp. 64-65).

It is thus clear that these ten items involve nothing more than (1) intercorporate contacts through a small minority of common directors, (2) a single joint venture into the construction business, or (3) the participation of UGI as a stockholder in matters involving all the stockholders. Even if they were all true, as they are not, any two adjacent corporations in a period of more than forty years might have done any one or more of those things without being subject to "control or controlling influence" depending upon the undisputed and governing circumstances which the Commission wholly ignores. In none of them was any control or controlling influence exercised upon Public Service.

As of the present, however, the Commission does not even go so far in the matter of relationships. It says only that UGI officials have been "consulted" on important problems and still receive reports "not furnished in the same form or detail to anyone else" (R. 45). There is even less substance to these statements than in the pointed innuendoes made in the Commission's discussion of the "historical relationship" between UGI and Public Service. Since the Commission has made no express finding of control based on the "historical" incidents, they might be passed by except for the gross distortion involved in the disarrangement of the facts so as to make it appear that there is lurid

evidence of evil and bad business morals in Public Service history. In the Appendix hereto (pp. 22-65) they are taken apart line by line and phrase by phrase and contrasted with the largely documentary and wholly undisputed record to the contrary.

B. The "historical relationship" between Public Service and United was of short duration, slight, and without significance.

The Commission devotes no findings to the advent of United into the relations of Public Service or the circumstances thereof. Its implication that there has been a "historical relationship between Public Service and * * * United over a period of 35 years" (R. 45) is a travesty.

In 1924 Messrs. Loomis and Thorne of Bonbright and Company acquired a substantial block of Public Service stock and became members of the board of Public Service (R. 231, 420). Thereafter, American Superpower Corporation was formed for the acquisition of electric utility securities and took over the Loomis and Thorne Public Service stock (R. 232, 275, 313-314, 678). Finally, in 1929 the United Corporation was formed by a group including Thorne, Loomis, and J. P. Morgan and Company, and took over the holdings of Superpower Corporation including its Public Service stock (R. 275, 304, 313-314, 421, 944, 945). Utility men from various interests served on the United board (R. 312-313), including Zimmermann of UGI (R. 944). McCarter of Public Service served as a United director from 1930 to 1934 (R. 311, 313, 1812, 1814), but took no active part (R. 417, 418).

United, of course, had no part in the organization of Public Service, which predated the former by twenty-six years. It did not, as the Commission finds, have "representation on applicant's board since 1930" (R. 33) for it had

only a single director—George H. Howard—from 1930 to 1935 (R. 1165, 1168) and he was never particularly active (R. 416-417, 710-711, 729).[18] "United representatives" did not serve "on applicant's executive committee until May 17, 1938" (R. 34), since Howard served thereon only while he was a director from 1930 to 1935 (R. 1165, 1169), and served on no other committees or in any other capacity; and no other representative of United served Public Service in any capacity whatever. Howard's directorship was therefore not "removed at the time and by reason of" the decision of this Court in the *Electric Bond & Share* case in 1938 as the Commission implies (R. 35).

The five slight and fully documented contacts of United, all of which were through Howard, in the various activities of Public Service mentioned by the Commission are as follows (Appendix, pp. 67-71):

> (1) As to the struggle by McCarter for a share in supplying electricity for the Pennsylvania railroad in New Jersey, Howard as a director of Public Service was called upon by McCarter to assist in the negotiations with Harley Clarke but participated in only one conference and made ineffectual inquiries (Appendix, pp. 67-69);
>
> (2) In the United Engineers & Constructors venture, Howard appeared on the scene as a Public Service director four years after the matter was initiated, served as a member of a committee on problems respecting a defaulting subsidiary of United Engineers, and left the picture before the venture was concluded (Appendix, p. 69);
>
> (3) Despite the Commission's assertion that United "took a very active part in connection with the proposals" for the reorganization of the Public Service

[18] Thorne and Loomis, active partners of Bonbright and Company (R. 421), had been directors of Public Service since 1924—five years before United was formed—and resigned in 1934 (R. 231, 1168).

transportation subsidiaries (R. 43), except that as a director of Public Service—long after the project was formulated and years prior to its conclusion—Howard may have participated in this highly important matter, there is no evidence of any participation by him or anyone else on behalf of United (Appendix, p. 69);

(4) Respecting the introduction of natural gas to the Atlantic seaboard, despite the Commission's finding that "United * * * was fully advised of these negotiations and discussions" (R. 43), the sole evidence is that Howard, like many other utility men, received a copy of studies made by McCarter as to the economic feasibility of bringing western natural gas to the east coast (Appendix, pp. 69-70); and

(5) As to the so-called merger of utilities on the Atlantic seaboard, with reference to which the Commission quotes without comment a very small part of a letter written by McCarter (R. 44), the fact is that McCarter had long and vigorously objected to any such project and wrote the letter only as a suggestion that, if anything were done, utilities be grouped into systems "of the Public Service type" (Appendix, pp. 70-71).

All of these intercorporate contacts were casual. Manifestly they are indicative of no control or controlling influence on the part of United.

C. The present relationship of UGI or United to Public Service activities is nil.

The Commission states positively that "there are no longer interlocking directorates" (R. 48). It asserts, however, that "UGI and United officials have still been consulted by applicant with regard to its important problems" and that McCarter has "consulted with them frequently with respect to the affairs of Public Service" (R. 45, 48), and insists that "UGI still receives detailed reports of the

applicant's operations which are not furnished in the same form or detail to anyone else" (R. 45). There is no substance to these assertions.

There were the following contacts: (1) in the final phases of perfecting the plan for the reorganization of the transportation subsidiaries, in which Drexel was hired to advise with respect to the financial and security aspects as set forth in the Appendix at pages 72-73, in September 1939 a meeting with Public Service representatives was held by Drexel at which the latter brought along Zimmermann of UGI (R. 537-540, 715) because, when previously a Public Service director, he had been active in the discussions and was still the representative of a substantial stockholder's interest (R. 1026-1027). (2) In May 1938 McCarter discussed with Zimmermann and Hopkinson a press release respecting their resignations from the board of Public Service and sent a copy to Howard of United (R. 1208-1210). (3) The next month he sent Zimmermann a note that Public Service had filed a registration statement with SEC in connection with some bonds to be sold to a syndicate headed by Morgan, Stanley & Company, to which Zimmermann replied that "this is extraordinarily cheap money" and requested a copy (R. 1416-1417). (4) Nine months later, in March, 1939, Zimmermann wrote McCarter a friendly note upon the latter's retirement as president of Public Service (R. 1162-1163). These are all the "frequent * * * consultations" the record contains. As for the "reports" which UGI receives, they are neither detailed nor withheld from other stockholders, as set forth at length in the Appendix at pages 64-65.

Conclusion.

There are here involved the vital features of one of the most important statutes of the past decade—a statute the administration of which this Court has not heretofore taken

occasion to consider. If the Holding Company Act permits the latitude and bears the construction placed upon it by the Commission, constitutional issues of grave importance are involved.

For the reasons stated in this Petition, therefore, it is respectfully submitted that this Court should exercise its authority to review the proceedings in this cause in order to determine whether or not they have been such as to require that the case be remanded for appropriate findings or such further proceedings by the Commission as the issues require.

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November 1942.

APPENDIX

The Appendix referred to in the foregoing Petition is separately printed and filed herewith.